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No. 612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

KAPLAN TRUCKING COMPANY,
Petitioner,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

JOHN P. McMAHON,
44 East Broad St., Columbus 15, Ohio,
Attorney for Petitioner.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled case on July 2, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the Board of Tax Appeals of Ohio is unreported and is printed in Appendix III. The opinion of the Court of Appeals of Ohio, for Cuyahoga County, is unreported, and is printed in Appendix II. The opinion of the Supreme Court of Ohio is printed in Appendix I and is reported in 168 Ohio St. 141, 151 N.E. 2d 654.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 2, 1958, see Appendix I. A timely application for rehearing, filed on July 16, 1958, was denied on October 8, 1958, and the denial was journalized by entry on the same date (R. iv.). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Was the petitioner's right to equal protection of the laws under the Constitution of the United States denied when the Tax Commissioner of Ohio assessed the Ohio Highway Use Tax against petitioner, an Ohio resident, and at the same time, did not assess such tax against Michigan and Indiana resident motor carriers who were directly competing with petitioner in Ohio?

STATEMENT OF THE CASE

A. Material Facts

The petitioner, Kaplan Trucking Company, is an Ohio corporation and has been a resident of the State of Ohio for over 30 years (R. 30). During all those years it has operated as a common carrier by motor vehicle in interstate commerce in and through the states of Ohio, Michigan, and Indiana, over routes authorized by the Interstate Commerce Commission (R. 19-22, Appellant's Exhibit A).

Petitioner specializes in the transportation of iron and steel and iron and steel products (R. 23, 25-27), and the transportation industry particularly as to those commodities is highly competitive in the matter of rates and service (R. 30-31). Petitioner competes directly with inter-

state motor carriers operating in Ohio, Michigan, and Indiana, who are residents of Michigan and Indiana (R. 35). Those carriers are specified in Stipulation No. 3, ten of whom are Indiana carriers, and fourteen of whom are Michigan carriers. They are authorized by the Interstate Commerce Commission to operate over the same routes as petitioner. There is no difference whatsoever in the operation of petitioner's vehicles and its Michigan or Indiana competitors' vehicles. They all operate in interstate commerce and perform the same type of service for the same customers by delivering like commodities to the same consignees with the same type of vehicles, over the same roads in Ohio (R. 38).

During the period of October 1, 1953, to September 30, 1955, the Tax Commissioner of Ohio required the petitioner and other Ohio resident interstate carriers to pay the Ohio Highway Use Tax but did not assess the tax against competing interstate carriers resident of Michigan and Indiana (Stipulation 2). During this period, the petitioner did not receive any tax exemption from the states of Michigan and Indiana substantially equal to the Ohio Highway Use Tax. Nor did its Michigan and Indiana competitors pay any tax to those states which was substantially equal to the Ohio Highway Use Tax. This meant that while petitioner paid its normal operating costs, plus the Ohio Highway Use Tax, its Michigan and Indiana competitors paid only their normal operating costs and did not pay the Ohio Highway Use Tax or a Michigan or Indiana tax equivalent to it.

State action which caused the discrimination complained of is as follows:

1. In 1937, the Ohio Reciprocity Board entered into certain reciprocity agreements with the states of Michigan

and Indiana. The taxes for which exemptions were granted by the agreements were substantially equal as between the different states at that time.

2. On October 1, 1953, the Ohio Highway Use Tax became effective (Sections 5728.01 to 5728.15, inclusive, Revised Code) and was levied on all interstate carriers including those resident in Michigan and Indiana. No similar or substantially equal taxes were levied by Michigan or Indiana. The state of Indiana has no so-called third structure tax whatsoever (R. 55-56). The Ohio Highway Use Tax is some six or seven times greater than the so-called Michigan Mileage Tax (Appellant's Exhibit F).

3. The Supreme Court of Ohio, on July 27, 1955, in *Interstate Motor Freight v. Bowers*, 164 Ohio St. 122, held that the 1937 reciprocity agreements exempted Michigan resident carriers from the payment of Ohio Highway Use Tax. The Board of Tax Appeals, in *Interstate Motor Freight v. Bowers*, B.T.A. No. 28024, decided on March 21, 1956, held that the Indiana resident carriers were exempted by the 1937 reciprocity agreements (Stipulation 2, R. 87).

4. The petitioner paid the Ohio Highway Use Tax on all its equipment which was operated in Ohio from the inception of the tax until July 1, 1955 (Appellant's Exhibit E). For the period of July 1, 1955, through December 31, 1955, petitioner filed its returns with the Tax Commissioner but refused to pay the tax because of the unconstitutional discrimination (R. 56-59, Stipulation 2). Thereupon, the Tax Commissioner made the assessment against petitioner for the period of July 1, 1955, to December 31, 1955, based upon petitioner's own returns as to mileage.

B. How the Federal Question is Presented.

Appellant first raised its constitutional objection in its petition for reassessment filed with the Tax Commissioner of Ohio, February 23, 1956 (See the Order of Tax Commissioner, Appendix IV). The Commissioner affirmed the assessment on the second day of March, 1956 (See Appendix IV).

Appellant then appealed to the Board of Tax Appeals of Ohio and in its notice of appeal again interposed its constitutional objections by assignment of errors (See the notice of appeal to the Board of Tax Appeals of Ohio, R. 6). The Board, on December 28, 1956, journalized its decision which, in effect, held that it had no jurisdiction to pass on the constitutionality of taxing statutes which entry is, in part, as follows:

"Appellant, in its brief, states the issue thus:

> Was the action of the Tax Commissioner discriminatory and unconstitutional when he assessed the highway use tax against appellant and other Ohio residents and, at the same time, did not assess Michigan and Indiana residents operating under like circumstances?" (Decision Unreported, See Appendix III, R. 10).

Under Ohio law, neither the Tax Commissioner nor the Board of Tax Appeals has jurisdiction over constitutional questions although either may construe a statute so as to avoid unconstitutionality.

Subsequently, and within time, appellant filed its notice of appeal with the Court of Appeals for Cuyahoga County, and set out the following in its assignment of errors:

> "Appellant states that the decision and entry of the Board of Tax Appeals is erroneous, unreasonable and unlawful in the following respects:
>
> (1) Said decision violates and deprives appellant of rights guaranteed it under Section 1 of the 14th Amendment to the Constitution of the United States.
>
> * * *

(3) Said decision and entry of the Board of Tax Appeals in affirming the assessments levied by the appellee against the appellant unlawfully imposes upon appellant a tax burden on the operation of its vehicles in direct competition with persons conducting similar business against whom such tax burden is not levied.

(4) Said decision and entry in affirming such conduct and administrative practice on the part of appellee unlawfully authorizes and approves the imposition of a tax discriminating against appellant in the conduct of its business.

" * * *" (R. 12, 13).

The Court of Appeals affirmed the judgment of the Board of Tax Appeals and journalized its entry on July 26, 1957 (R. 14). Thereupon, a notice of appeal to the Supreme Court of Ohio was filed by appellant on the constitutional question. The Supreme Court of Ohio allowed the appeal on the constitutional question. The assignments of error filed in the Supreme Court of Ohio were the same as those filed in the Court of Appeals which are set out above, although they were addressed to the decision and entry of the Court of Appeals.

The Supreme Court affirmed the judgment of the Court of Appeals on July 2, 1958, and the decision was journalized by entry on the same date (See Appendix I). Application for rehearing was filed July 16, 1958, and was denied October 8, 1958. The denial was journalized by entry on the same date. (R. iv.). This petition for certiorari is filed from the above judgment.

Motion was duly filed with the Ohio Supreme Court to certify its holding, and make such certification a part of its judgment. The Court did certify that the constitutional question presented in this case was placed in issue by the Petitioner and that a determination of the constitutional question was appropriate and necessary to a decision in this case. The certificate is printed in Appendix V.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of Ohio has erroneously decided a substantial and unsettled federal question arising under the Constitution of the United States.

Ohio levied a tax which by its terms applies to all persons, residents and non-residents alike. However, the ultimate result of the administration of this tax by Ohio officials is that it was assessed against Ohio residents but was not assessed against Indiana and Michigan residents who were in direct competition with Ohio residents. This presents the question of equal protection of the laws just as directly as does the more common situation encountered where states attempt, by taxation, to discriminate against non-residents in favor of residents. Residents of the several states are entitled to protection of their constitutional rights against actions of their own states in the same manner as they are entitled to protection against actions of other states. *Little v. Smith*, 124 Kan., 237, 259; and *In re Cole's Estate*, 253 N.Y.S., 654, 657, affirmed without decision, 261 N.Y.S., 135.

Ohio has already been told, in *Wheeling Steel Corporation v. Glander*, 337 U.S., 562, 93 L. Ed., 1544, 69 S. Ct., 291 (1949), that in matters of taxation non-residents are entitled to the equal protection of the laws. Nothing in that decision, however, restricts the application of its constitutional principles to non-residents and Petitioner herein claims for itself the rights which are clearly specified in and protected by the *Wheeling Steel* decision.

The decision of the Ohio Supreme Court in the instant case is contrary to the constitutional principles announced in the *Wheeling Steel* case, supra. In that case, the Tax Commissioner of Ohio taxed accounts receivable of a

foreign corporation, and at the same time exempted those of a domestic. As in the present case, the difference between taxation and exemption was based upon residence alone. At page 572 this Court stated:

> "It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, *but solely because of the different residence of the owner*". (Emphasis added).

If the decision of the Supreme Court of Ohio is correct in the instant case the equal protection clause affords protection only to non-residents even though by its very terms it applies to "any person".

This Court in the *Wheeling Steel* case further held that the discrimination between residents and non-residents cannot be cured by reciprocity unless its actual operating effect results in substantial equality. The constitutional requirement of an equal bargain between states in the field of reciprocity is clearly spelled out in this Court's opinion. The Ohio Tax Commissioner's claim that the mere existence of a plan of reciprocity accorded equal protection of the laws, regardless of its operative effect, was repudiated. The Tax Commissioner again makes the same claim in the present case and the Supreme Court of Ohio in its decision apparently has adopted his reasoning directly contrary to this Court's decision in the *Wheeling Steel* case.

The Personal Property Tax statute in question in the *Wheeling Steel* case dealt with the fixing of situs for intangible property, both within and without the state. The reciprocity plan allowed the State of Ohio to tax the intangibles of non-residents while it excluded the intangibles of residents located outside the State of Ohio. The exempted intangibles of residents were offered to the taxing

power of other states. This Court, in referring to this plan, made the following statements at pages 573 and 574:

"It is hard to see that this offer of reciprocity restores to appellants any of the equality which the application of the Ohio tax, considered alone, so obviously denies."

• • •

"The proffered exchange of residents for intangible tax purposes may not commend itself as an even bargain between states."

• • •

"In the several years that the Ohio statute has been on the books, no other state has sought to take advantage of the 'reciprocity' proffer. And if it did, the equality of rates which would also be necessary to equalize the burden between nonresidents and their resident competitors could be hardly expected nor is it provided for."

• • •

"It is clear that this plan of 'reciprocity' is not one which by credits or otherwise protects the nonresident or foreign corporation against the discriminations apparent in the Ohio statute. We think these discriminations deny appellants equal protection of Ohio law."

The actual operation of reciprocity in this case has not cured the discrimination against Petitioner and other Ohio resident carriers. The State of Indiana had no highway use tax whatsoever from which the residents of Ohio were exempted. The Ohio residents received absolutely no favor from the State of Indiana for allowing the residents of Indiana to go free from our Highway Use Tax. The only conclusion that can be reached is that equality is not re-established by reason of reciprocity with Indiana and Michigan, and the unconstitutional discrimination remains uncured.

The question presented in this case should be heard and determined by this Court on its merits so as to settle

the constitutional question and clarify the limitation of reciprocity. The ruling of the Ohio Supreme Court is in direct conflict with the decision in the *Wheeling Steel* case. The law should be settled on such important issues as discrimination against residents and the effect thereof of reciprocity. At the present time, there are many other claims still pending in the Ohio Board of Tax Appeals awaiting this Court's determination of this case. All Ohio interstate carriers are affected by the decision herein.

2. The Supreme Court of Ohio, in its effort to find Petitioner has not been deprived of its constitutional rights, made a statement in its opinion which is clearly incorrect and which bears on the question presented to this Court. At page 142 it is stated:

> "However, it should be noted that, during the period the reciprocity agreements were in effect, the Ohio domiciled appellant *paid no Ohio tax on its equipment licensed in Michigan or Indiana*, * * *." (Emphasis supplied).

This simply is not true. The record does not support this conclusion. Vehicles licensed in the state of Michigan or Indiana, and operated by petitioner, did pay the Ohio Highway Use Tax for miles operated in the state of Ohio. Michigan and Indiana carriers, initially, either paid or were assessed Ohio Use Tax for miles operated in the State of Ohio, by vehicles which they licensed in Michigan or Indiana. In *Interstate Motor Freight v. Bowers*, 164 Ohio St., 122, the Supreme Court of Ohio determined that certain reciprocity agreements served to exempt such vehicles operated in Ohio by Michigan residents from the Ohio Highway Use Tax. Thereupon, the Board of Tax Appeals made a similar ruling for the Indiana resident carriers.

The Tax Commissioner refunded monies or canceled the assessments for Ohio Highway Use Tax against such Michigan or Indiana resident carriers. At the same time, however, he has refused to take similar action with regard to equipment operated by Petitioner which was licensed in Michigan or Indiana. The reason given is that the Petitioner is a resident of Ohio and the reciprocity agreements do not exempt Ohio residents. To this date, the Tax Commissioner is still refusing to reimburse Petitioner for taxes paid on equipment which it operated and which was licensed in the states of Michigan or Indiana. This, of course, is conclusive that the reciprocity agreements were actually based upon residency, despite the erroneous statement by the Supreme Court of Ohio.

3. Petitioner's claim is not based on the unconstitutionality of the Highway Use Tax Act since it is levied against all interstate carriers including residents of Michigan and Indiana. This was recognized by the Supreme Court of Ohio in its opinion, at page 142 (See Appendix A, page 14):

> "Although the constitutionality of the statutes themselves was attacked in its petition for reassessment, the appellant's sole present contention is that of discriminatory and unconstitutional administration of the tax predicated on the fact that, during the period involved, the appellant was expected to pay the tax but its competitors, domiciled in Michigan and Indiana, were not required to pay it in view of certain reciprocity agreements then existing between Ohio and those states."

Petitioner's claim is that the action of the Tax Commissioner in assessing Ohio residents and not assessing Michigan and Indiana residents is so discriminatory that it denies petitioner equal protection of the laws guaranteed by Section 1 of the 14th Amendment to the United States

Constitution. This question has never been before this Court. This Court did decide that there was no substantial federal question in the case of *Geo. F. Alger Co. v. Bowers*, ... U. S. ....., 79 S. Ct. 21 (October 13, 1958). However, the *Alger* case was limited to whether the Highway Use Tax Act was constitutional as enacted. The facts presented in the instant case were not included in the *Alger* case, and could not be included in the *Alger* case since the Geo. F. Alger Co. is a Michigan resident motor carrier.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN P. McMAHON,
44 East Broad St., Columbus 15, Ohio,
Attorney for Petitioner.

APPENDIX I

Opinion and Judgment of the Ohio Supreme Court

KAPLAN TRUCKING CO., APPELLANT, *v.* BOWERS, TAX COMMR., APPELLEE.

Taxation—Highway use tax—Sections 5728.01 to 5728.14, Revised Code—Administration of statutes—Reciprocity agreements with other state—Ohio and foreign motor transportation companies—Equal protection—Classification not unconstitutional.

(No. 35325—Decided July 2, 1958.)

Appeal from the Court of Appeals for Cuyahoga County.

The appellant is an Ohio Corporation engaged in the motor transportation business as a common carrier operating over the highways of Ohio and neighboring states in both intrastate and interstate commerce.

The appellant filed a highway use tax return for the third and fourth quarters of the year 1955, based on its use of Ohio highways during that period of six months. However, it refused to pay the tax on the contention that the effect of the tax as administered was discriminatory and hence violative of the federal and state Constitutions.

On February 15, 1956, the Tax Commissioner levied an assessment against the appellant in the amount of $44,549.67, plus a penalty. A petition for a reassessment was denied.

On an appeal to the Board of Tax Appeals, the assessment was affirmed.

On a further appeal to the Court of Appeals for Cuyahoga County, the decision of the Board of Tax Appeals was affirmed.

The cause is in this Court for a further review by reason of an appeal as of right and also the allowance of the appellant's motion to certify the record.

Messrs. George, Greek, King & McMahon, Mr. Charles E. Shanklin and *Mr. James M. Burtch, Jr.*, for appellant.

Mr. William Saxbe, attorney general, and *Mr. John M. Tobin*, for appellee.

Per Curiam. The statutes relating to the highway use tax are Sections 5728.01 to 5728.14, inclusive, Revised Code.

The Board of Tax Appeals held that, as an administrative agency, it is without authority to determine the constitutionality of statutory enactments, and the Court of Appeals wrote no opinion. Hence, this court is without the benefit of their views on the question.

Although the constitutionality of the statutes themselves was attacked in its petition for reassessment, the appellant's sole present contention is that of discriminatory and unconstitutional administration of the tax predicated on the fact that, during the period involved, the appellant was expected to pay the tax but its competitors, domiciled in Michigan and Indiana, were not required to pay it in view of certain reciprocity agreements then existing between Ohio and those states.

However, it should be noted that, during the period the reciprocity agreements were in effect, the Ohio domiciled appellant paid no Ohio tax on its equipment licensed in Michigan or Indiana, and no Michigan or Indiana tax on its equipment licensed in Ohio.

In its brief the appellant's present contention is stated as follows:

"Appellant does not claim that the highway use tax is unconstitutional. Appellant makes the same claim as the plaintiffs made in the *Raymond case, supra* [*Raymond*,

Treas. v. Chicago Union Traction Co., 207 U. S., 20, 52 L. Ed., 78, 28 S. Ct., 7], that it was the action of the administrators of the law which caused appellant to have its constitutional rights violated."

Hence, it is urged by the appellant that, since its conteption of unconstitutionality does not involve the statutes themselves but merely the administrative application of the statutes, a bare majority of this court can so hold without "the concurrence of at least all but one of the judges" required by the provisions of Section 2 of Article IV of the Constitution of Ohio. However, in view of the conclusion reached by the court in this case, it is not necessary to consider that question.

Have these statutes been so applied as to produce an unconstitutional result?

The appellee Tax Commissioner seeks to simplify and strengthen his position by asking this court to overrule decision in the case of *Interstate Motor Freight System v. Bowers, Tax Commr.*, 164 Ohio St., 122, 128 N. E. (2d), 97, in which it was held that, by reason of the reciprocity agreements then existing between Ohio and the states of Michigan and Indiana, nonresident motor vehicle common carriers domiciled therein were exempted from payment of the Ohio highway use tax. However, that decision has been neither overruled nor reversed, and the reciprocity agreements have been canceled. Furthermore, it is not necessary to overrule that decision in order to affirm the judgment of the Court of Appeals in the instant case.

The appellant's basic contention is that the constitutional guarantee of equal protection of the laws was violated by the administrative classification of motor vehicle common carriers according to state residency, namely, requiring the Ohio highway use tax to be paid by carriers domiciled in

Ohio but not by those domiciled in Michigan or Indiana. However, the appellee Tax Commissioner insists that residency was not the only test but that a second was the place of maintenance and registry of vehicles. He contends that the classification was not unconstitutional or discriminatory among members of the same class in view of the evidence that during the period the reciprocity agreements were in effect the appellant paid Michigan taxes on vehicles which it owned and licensed in Michigan but did not pay the larger Ohio taxes on those vehicles; that it paid no Michigan or Indiana tax on its equipment licensed in Ohio; that all Ohio domiciled competitors of the appellant were likewise required to pay the tax; that Michigan and Indiana carriers were allowed free use of Ohio highways, and Ohio carriers enjoyed a similar privilege in Michigan and Indiana; that the appellee Tax Commissioner was of the opinion that the use tax was not within the purview of the reciprocity agreements but that he was obliged to follow the contrary view of this court; and that the reciprocity agreements were canceled soon after the decision of this court in the *Interstate Motor Freight System case, supra.*

After a study of the record and the authorities cited in the briefs of counsel, this court is of the view that the classification in effect during the limited period here involved was not such as to warrant this court in holding it without reason under the particular circumstances. It was not unconstitutional, and the judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

WEYGANDT, C. J., ZIMMERMAN, STEWART, MATTHIAS, BELL and HERBERT, JJ., concur.

TAFT, J., dissents.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

APPENDIX II

Opinion of Court of Appeals

"Judgment affirmed. Exceptions. Order see Journal."

APPENDIX III

Entry of the Board of Tax Appeals

(Dated December 28, 1956)

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein under date of March 28, 1956, by the appellant above named from a final order of the Ohio Tax Commissioner dated March 2, 1956, in and by which final order said official confirmed a highway use tax assessment against appellant for the audit period July 1, 1955, to December 31, 1955, in the basic amount of $44,549.67, with a possible $6,682.45 penalty to be contingent upon date of payment of the basic assessment as set out by the terms of the final order.

The cause was submitted on the notice of appeal, the transcript supplied by the Tax Commissioner, the testimony and evidence presented at a hearing before the Board of Tax Appeals, and the briefs supplied by counsel.

The appellant is an Ohio corporation and during the period covered by the assessment it was engaged in the

motor transportation business as a common carrier operating over the Ohio highways, both in interstate and intrastate commerce. The appellant prepared and filed its Ohio highway use tax return for the third and fourth quarter of the year 1955 based on its use of Ohio highways for this period, but refused to pay the Ohio highway use tax for the reasons set out in its petition for reassessment. Thereafter, the Tax Commissioner denied appellant's petition for reassessment and issued the final order herein complained of.

In its notice of appeal, as filed with the Board of Tax Appeals, the appellant says that the assessment as confirmed by the final order is erroneous in the following respects:

"(1) Sections 5728.01 to 5728.14 Revised Code are null and void and in violation of the provisions of the Constitution of the United States and without limiting the foregoing in violation of the following specific provisions of the Constitution of the United States:

(a) Article I, Section 8, Clause 3;

(b) Article I, Section 10;

(c) Amendment XIV of the Constitution of the United States.

(2) Sections 5728.01 to 5728.14, of the Revised Code are null and void and in violation of the provisions of the Constitution of the State of Ohio and without limiting the foregoing in violation of the following specific provisions of the Constitution of the State of Ohio:

(a) Article I, Section 2;

(b) Article I, Section 16;

(c) Article II, Section 26;

(d) Article II, Section 28;

(e) Article XII, Section 5.

(3) Sections 5728.01 to 5728.14 of the Revised Code are null, void and inoperative in their entirety by reason of having been declared inapplicable to commercial cars with three or more axles operated by 'Michigan motor carriers' as that term is defined in the agreement between the State of Ohio and the State of Michigan dated October 26, 1937 and also by reason of being inapplicable to similar commercial cars operated by other out-of-state motor carriers under agreements between the State of Ohio and numerous other states, thereby defeating the entire legislative purpose of the statute and rendering the statute inequitable, unjust and discriminatory in its application to the remaining commercial cars with three or more axles, contrary to the intent of the legislature of Ohio, to provide uniform treatment.

(4) The exception contained in Sections 5728.01 to 5728.14 Revised Code—excluding a highway under the control and jurisdiction of the Ohio Turnpike Commission from the definition of a 'Public Highway' results in unjust discrimination against carriers who are unable to operate commercial cars on such turnpikes.

(5) Sections 5728.01 to 5728.14 of the Revised Code make up one inseparable tax law which must apply alike to all privately operated commercial cars with three or more axles or otherwise have no application at all."

Appellant, in its brief, states the issue thus:

"Was the action of the Tax Commissioner discriminatory and unconstitutional when he assessed the highway use tax against appellant and other Ohio residents and, at the same time, did not assess Michigan and Indiana residents operating under like circumstances?"

to pass on the constitutionality of taxing statutes. This ute, has only such authority and jurisdiction as is given it by statutes and said board has been given no jurisdiction to pass on the constitutionality of taxing statutes." This board must, and does, assume that all taxing statutes are valid enactments. In this connection see Schwartz v. Essex County Board of Taxation, 120 N. J. L., 129, 132, affirmed 130 N. J. L., 177, where it was said:

> "It is undisputable that the determination of the constitutionality of an act of the legislature rests with a judicial body; not with a quasi-judicial body such as the State Board of Tax Appeals. The final responsibility to pass upon the constitutionality of a given piece of legislation rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified body."

The Board of Tax Appeals finds that the assessment herein complained of was issued in accordance with law and that the Tax Commissioner committed no error in the issuance of his final order. The final order of the Tax Commissioner is, therefore, affirmed.

APPENDIX IV

Order of Tax Commissioner

March 2, 1956.

This matter came on to be heard and the Tax Commissioner hereby finds that: James M. Burtch, attorney-at-law, 44 E. Broad St., Columbus, Ohio, appeared for hearing at Columbus, Ohio on February 23, 1956.

Exception is taken to assessment of the Ohio highway use tax as specified in the petition for reassessment as follows:

(1) Sections 5728.01 to 5728.14 of the Revised Code are null and void in violation of the provisions of the Constitution of the United States and without limiting the foregoing in violation of the following specific provisions of the Constitution of the United States:

(a) Article I, Section 8, Clause 3;

(b) Article I, Section 10; and

(c) Amendment 14 of the Constitution of the United States.

(2) Sections 5728.01 to 5728.14 of the Revised Code are null and void in violation of the provisions of the Constitution of the State of Ohio and without limiting the foregoing in violation of the following specific provisions of the Constitution of the State of Ohio:

(a) Article I, Section 2;

(b) Article I, Section 16;

(c) Article II, Section 26;

(d) Article II, Section 28 and

(e) Article XII, Section 5.

(3) Sections 5728.01 to 5728.14 of the Revised Code are null, void and inoperative in their entirety by reason of having been declared inapplicable to commercial cars with three or more axles operated by "Michigan motor carriers" as that term is defined in the agreement between the State of Ohio and the State of Michigan dated October 26, 1937 and also by reason of being inapplicable to similar commercial cars operated by other out-of-state motor carriers under agreements between the State of Ohio and numerous other states, thereby defeating the entire legislative purpose of the statute and rendering the statute inequitable, unjust and discriminatory in its application of the remaining commercial cars with three or more axles, contrary

to the intent of the legislature of Ohio to provide uniform treatment.

(4) Sections 5728.01 to 5728.14 of the Revised Code make up one inseparable tax law which must apply alike to all privately operated commercial cars with three or more axles or otherwise have no application at all.'

As to the constitutional question raised by petitioner, the Tax Commissioner finds that he is without jurisdiction to set aside acts of the legislature on the ground that they are unconstitutional.

Therefore, it is the order of the Tax Commissioner that if payment of

	Assessment	Penalty	Total
(HUT)	$44,549.67	Cancelled	$44,549.67

is made within thirty (30) days from date of receipt by the taxpayer of the journal entry showing final determination, the assessment shall stand as adjusted in the above amount. In the event this matter is appealed to the Board of Tax Appeals; to an appropriate Court of Appeals; or to the Supreme Court, said thirty (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court or the Supreme Court is rendered.

If the total amount is not paid as above provided, the assessment shall stand as issued in the following amount:

	Assessment	Penalty	Total
(HUT)	$44,549.67	$6,682.45	$51,232.12

Department of Taxation
/s/ Stanley J. Bowers
Tax Commissioner"

APPENDIX V

Certificate

On motion of appellant, Kaplan Trucking Co., it is ordered to be certified and made a part of the record of the proceeding and of the judgment of the Court in the cause that by its appeal from the Board of Tax Appeals, and the Court of Appeals for Cuyahoga County, Ohio, the appellant placed in issue the constitutionality of the administration of the Ohio Highway Use Tax contending that the actions of the Tax Commissioner denied appellant (an Ohio resident corporation) equal protection of the laws in violation of Section 1 of the 14th Amendment of the United States Constitution, for the reason that he assessed appellant as an Ohio resident motor carrier for said tax and, at the same time, did not assess Michigan and Indiana resident motor carriers competing with appellant under like circumstances despite the fact that there were no highway use taxes in those states substantially equivalent to the Ohio Highway Use Tax which the Michigan and Indiana residents were required to pay, or from which petitioner was exempted. This Court found and decided that the actions of the Tax Commissioner in so taxing appellant, were not invalid and were not repugnant to the United States Constitution. A determination of that question was appropriate and necessary to a decision in this case.

Witness the Honorable Supreme Court of Ohio this eighth day of December, 1958.

Supreme Court of Ohio
Carl V. Weygandt
Chief Justice of the Supreme Court of Ohio.

ILE COPY

Office-Supreme Court, U.S.
FILED
FEB 12 1959
JAMES R. BROWNING, Clerk

No. 612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

KAPLAN TRUCKING COMPANY,
Petitioner,

vs.

STANLEY J. BOWERS, TAX COMMISSONER OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

MARK MCELROY,
Attorney-General,
JOHN M. TOBIN,
Assistant Attorney General,
Attorneys for Respondent.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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STATEMENT OF THE CASE

On February 15, 1956, the Tax Commissioner of Ohio levied an assessment against the petitioner based upon petitioner's use of the Ohio highways. Petitioner, being dissatisfied with the assessment, perfected an appeal. At every stage of the appeal the Tax Commissioner's assessment was affirmed.

The petitioner is a corporation organized under the laws of Ohio with its principal place of business in Cleveland, Ohio, and is a common carrier by motor vehicle conducting both interstate and intrastate operations (R. 19).

Kaplan Trucking Company has intrastate operating authority only in Ohio (R. 82). However, the company

maintains twenty-two terminals in the various states in which it is authorized to conduct interstate business, and it licenses its equipment in the state in which the equipment is maintained (R. 72). This out-of-state licensed equipment is used in operations into and through Ohio (R. 27).

Petitioner prepared and filed its Ohio highway use tax return based upon its use of Ohio highways during the audit period in question. However, petitioner refused to pay the tax contending that it had been denied the equal protection of the laws inasmuch as its competitors, residents of Michigan and Indiana, were not required to pay the tax by reason of the Ohio Supreme Court interpretation of certain reciprocity agreements in *Interstate Motor Freight System v. Bowers*, 164 Ohio St., 122, 128 N.E. 2d. 97.

During the period that the reciprocity agreements in question were in effect, the petitioner paid no Ohio taxes on its equipment which was licensed in Michigan or Indiana, and no Michigan or Indiana taxes on its Ohio-licensed equipment (R. 47-50).

ARGUMENT

I.

The Decision of the Ohio Supreme Court is Consistent with its own Prior Decisions and with the Decisions of this Court and no Substantial Unsettled Federal Question is here Presented.

The petitioner argues that the action of the Tax Commissioner of Ohio in levying a highway use tax assessment against it is unconstitutionally discriminatory in that competitors of petitioner are excused from this tax by reason of reciprocity agreements. Petitioner contends that it is a member of the same class as nonresidents engaged in motor transportation and that there is no basis for according it treatment unlike that granted nonresidents. The reciprocity agreements of 1937, which provided for waiver of highway fees and taxes, created two separate classifications. These agreements were entered by statutory authorization. They are therefore, in effect, acts of the legislature. Legislative bodies have historically been given wide latitude in problems of classification and the classification thus established has been upheld so long as not found to be arbitrary. *Interstate Busses Corp. v. Blodgett*, 276 U. S., 245, 48 S. Ct., 230, 72 L. Ed., 551; *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U. S., 285, 55 S. Ct., 709, 79 L. Ed., 1439; *Storaasli v. Minnesota*, 283 U. S., 57, 51 S. Ct., 354, 75 L. Ed., 839.

The Ohio Supreme Court at pages 564 and 565 of *State ex rel. Struble, v. Davis*, 132 Ohio St., 55[illegible] (noted):

> "There is no division of authority upon the proposition that in the matter of classification the legislature has a wide discretion, and that its action in that regard will not be set aside by the courts unless the

> classification attempted results in such discrimination against members *of the same class* as to deny them the equal protection of the laws. * * *" (Emphasis added.)

At page 537 of *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S., 527, 51 S. Ct., 540, 75 L. Ed., 1248, the following observation is made:

> "* * *. The Fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, * * * or if any state of facts reasonably can be conceived to sustain it. * * *"

It is submitted that a reasonable basis does exist for a difference in treatment between the petitioner and non-resident truckers. That basis is reciprocity. Agreements between states of the Union involving water rights, bridges, fishing privileges and taxation problems have been upheld. See 134 A. L. R., 1412 to 1424.

The case of *Atlantic & Danville Ry. Co. v. Hooker*, 194 Va., 496, 74 S. E. 2d, 270, involved the question of highway use taxation and reciprocity agreements. In concluding its opinion, the court stated at page 283 of the decision as reported in 74 S. E. 2d as follows:

> "In the application and administration of the Virginia reciprocity agreement, all Virginia interstate carriers, corporate and unincorporate, obtain *a substantial benefit in the free use of the roads of a foreign state in return for similar benefits granted carriers of the foreign state, a typical example of reciprocity.* Whether the benefit obtained by Virginia carriers is equal or superior to the benefits gained by foreign carriers is a question of fact. As to such fact, the record discloses that representatives and agents of Virginia motor carriers have testified, without contradiction, that reciprocity as applied in Virginia works

to the economic advantage of the commonwealth and its domestic carriers, corporate and unincorporate." (Emphasis added.)

The quoted language would seem to apply with substantial force to the instant problem.

In its potition Kaplan Trucking Company has stressed the case of *Wheeling Steel Corporation v. Glander*, 337 U. S., 562, 69 S. Ct., 1291, 93 L. Ed., 1544. It is urged by the petitioner that the *Wheeling Steel* decision is inconsistent with the decision in the instant case. We submit, however, that no such inconsistency exists. It is the position of the Tax Commissioner that the *Wheeling Steel* case is not dispositive of this appeal nor is the decision of the Ohio Supreme Court inconsistent with it. In the *Wheeling Steel* case the State of Ohio offered to fix reciprocally the situs of intangible property for taxation purposes. No sister state accepted this offer. Ohio had no control over the property in question. In the instant case we have a reciprocity agreement entered into concerning highways owned by the State of Ohio. Ohio, on the one hand, and Michigan and Indiana, on the other hand, had agreed reciprocally to forego the collection of specific taxes levied in connection with the use of the states' roads. The contracting states had each given up something of value in exchange for something else of value. Under the decision of *Interstate Motor Freight System v. Bowers*, 164 Ohio St., 122, 128 N.E. 2d, 97, the State of Ohio and the State of Michigan permitted free use of each other's highways. The same exchange was operative in the Indiana-Ohio situation.

The Ohio Supreme Court terminated its opinion as follows:

"After a study of the record and the authorities cited in the briefs of counsel, this court is of the view

that the classification in effect during the limited period here involved was not such as to warrant this court in holding it without reason under the particular circumstances. It was not unconstitutional, and the judgment of the Court of Appeals must be affirmed."

It is submitted that this conclusion is consonant with the pertinent decisions of this court and no substantial federal question is here presented.

II.

The Factual Conclusion of the Supreme Court of Ohio that Petitioner Paid no Ohio Tax on its Equipment Licensed in Michigan or Indiana is Fully Supported by the Record.

The petitioner alleges that the Supreme Court of Ohio made an incorrect factual determination. The attention of this court is invited to pages 47 to 50 of the record wherein counsel for the petitioner examined an official of Kaplan Trucking Company on the question of whether or not the company paid Ohio tax on its equipment which was licensed and maintained in Michigan and Indiana. The consistent answers of the witness resolve all doubt on the question.

While petitioner has approached the classification problem in its petition as if the question presented was one of residence alone, the evidence above referred to discloses that in practical operation the petitioner founded the classification not only on the basis of residence but also upon a characteristic of the vehicles. It seems to follow that if petitioner is correct in its interpretation that it did not owe Ohio taxes for equipment maintained and registered in either Michigan or Indiana, then its argument on

the basis of improper classification fails since, if it is correct, the basis for the classification was not solely the residence of the owner of the equipment in question, as petitioner has urged, but additionally the place of maintenance and registry of the vehicles.

III.

The Assessment of the Tax Commissioner is not so Discriminatory that it Denies Petitioner Equal Protection of the Laws.

Since it is felt that this problem has been amply discussed under heading numbered I, repetition of the argument and authorities there cited is deemed unnecessary. Suffice it to say that the Tax Commissioner's action was based upon a properly conceived classification and was consistent with the Ohio highway use tax statutes and in conformity with the pertinent decisions of the Ohio Supreme Court. Additionally, the Tax Commissioner's action was not violative of constitutional guarantees nor opposed to decisions of this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully Submitted,

MARK MCELROY,
Attorney General,
JOHN M. TOBIN,
Assistant Attorney General,
Attorneys for Respondent.